

**McClain of Georgia, Inc. and Shopman's Local Union  
No. 616 International Association of Bridge,  
Structural and Ornamental Iron Workers,  
AFL-CIO.** Cases 10-CA-28231-3, 10-CA-  
28422, 10-CA-28526, and 10-CA-28628

April 11, 2001

**SUPPLEMENTAL DECISION AND ORDER  
BY CHAIRMAN TRUESDALE AND MEMBERS  
LIEBMAN  
AND WALSH**

On October 17, 1996, the Board issued a Decision and Order in this proceeding,<sup>1</sup> in which it ordered the Respondent, *inter alia*, to offer reinstatement to certain employees and to make them whole for any loss of earnings suffered by reason of the Respondent's discrimination against them. On April 17, 1998, the United States Court of Appeals for the Eleventh Circuit issued its opinion enforcing the Board's Order.<sup>2</sup>

A controversy having arisen over the amounts of backpay due under the terms of the Board's Order on June 4, 1999, the Regional Director for Region 10 issued a compliance specification and notice of hearing, identifying certain individuals as the discriminatees who are entitled to backpay and alleging the amounts of backpay due. The Respondent requested and received an extension of time to file its answer. On July 12, 1999, the Respondent filed an answer to the compliance specification.

On July 15, 1999, the Regional Director notified the Respondent that its answer did not comply with the requirements of Section 102.56 of the Board's Rules and Regulations. The letter advised the Respondent that unless a proper amended answer was filed by the close of business on July 23, 1999, a Motion for Partial Summary Judgment would be filed as to all matters improperly answered. The Respondent requested and received an extension of time to file its amended answer. On July 26, 1999, the Respondent filed its amended answer.

On August 4, 1999, the General Counsel filed with the Board a motion to transfer case to and continue proceedings before the Board for Partial Summary Judgment and to strike affirmative defenses. On August 6, 1999, the Board issued an order transferring proceeding to the Board and Notice to Show Cause why the General Counsel's motion should not be granted. On September 3, 1999, the Respondent filed a response to the Notice to Show Cause.

<sup>1</sup> 322 NLRB 367.

<sup>2</sup> 138 F.3d 1418.

The National Labor Relations Board has delegated its authority in this proceeding to a three member panel.

On the entire record, the Board makes the following

**Ruling on Motion for Partial Summary Judgment  
and to Strike Affirmative Defenses**

Section 102.56(b) and (c) of the Board's Rules and Regulations states:

(b) *Contents of answer to specification.* The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

(c) *Effect of failure to answer or to plead specifically and in detail to backpay allegations of specification.* If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the respondent, find the specification to be true and enter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure to so deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

**Discussion and Analysis**

1. Paragraph 1 of the compliance specification alleges the backpay periods for 12 discriminatees, only four of which the Respondent disputes.<sup>3</sup> The Respondent's

<sup>3</sup> The Respondent's amended answer disputes the backpay periods for three discriminatees. In its response to the Notice to Show Cause, the Respondent, addressing its failure to admit or deny the backpay

amended answer and response to the Notice to Show Cause contend that the backpay periods for the four discriminatees ended February 3, 1995, rather than the date in the compliance specification, and that the Respondent had no legal duty to employ them at any time after February 3, 1995. This contention is referred to throughout this decision as the Baker Tanks defense.

The General Counsel contends that the Respondent's Baker Tanks defense is an attempt to relitigate matters that were raised and decided in the underlying unfair labor practice proceeding. The Respondent claims that the judge's and Board's findings are not relevant to the backpay proceeding because the court did not enforce the portion of the Board's decision dealing with the Baker Tanks defense, and therefore, it must be permitted to raise the Baker Tanks defense in the compliance proceeding. As our discussion below makes clear, the Respondent's contention that the court did not enforce the Board's decision in its entirety hinges on a misunderstanding of the court's decision.

A review of the underlying unfair labor practice proceeding reveals the following. The Respondent manufactures solid waste containers at several facilities around the country, including Macon, Georgia, where the facility at issue in this case is located. In 1993 the Respondent began receiving orders from Baker Tanks for containers. The Respondent decided to manufacture some of these containers in Macon.

The Respondent received its last order from Baker Tanks on November 15, 1994. On January 18, 1995, the Respondent laid off the employees involved in this backpay proceeding. The Respondent claimed that the layoffs were in response to a decline in business caused by the loss of Baker Tanks' business. On February 3, 1995, the Respondent completed Baker Tanks' last order.

The judge specifically considered and rejected the Baker Tanks defense. The judge found that, although several plants performed work for Baker Tanks, there were no layoffs at any facility other than in Macon. Further, 6 weeks after receiving the last Baker Tanks order, the Respondent promised employees that it would send work from other facilities if necessary to avoid layoffs in Macon. As the judge aptly stated:

Respondent has shown nothing to have occurred—at Macon or at any other facility—that was not already

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period for a fourth employee (James Warner), states essentially that its amended answer would have disputed the backpay periods for four employees but for an oversight. A respondent may cure defects in its amended answer before a hearing in its response to the Notice to Show Cause. *United States Service Industries*, 325 NLRB 485 fn. 2 (1998). We find the Respondent's response to the Notice to Show Cause cured this defect in its amended answer.

known to [Respondent] in late December and early January when [Respondent] promised employees there would be no layoff . . . . The only significant intervening event between that time and the layoff was the Union filing its second petition on January 9. [322 NLRB at 380.]

The judge concluded that the decision to lay off employees was "motivated solely by [the Respondent's] desire to retaliate against employees because the Union had filed a second petition." *Id.* The Board affirmed the judge's conclusion.

The court enforced the Board's decision regarding the layoffs. Concerning the Respondent's economic defense, the court held as follows:

[T]he ALJ . . . acknowledged that the Company had produced evidence showing a nondiscriminatory reason for the layoffs—the cutoff in Baker Tanks orders—but concluded that this reason was not the real reason for the layoffs . . . . [T]he ALJ . . . considered the Company's purported reasons and explicitly set forth his reasons for rejecting them as pretextual. The Board adopted this analysis and, for the reasons discussed above, we find that it is supported by substantial evidence. [138 F.3d at 1425.]

The Respondent, ignoring the court's explicit mention of the Baker Tanks defense, focuses on the following statement in footnote 4 of the court's decision.

The Company . . . challenges the Board's remedy of ordering reinstatement with back pay to the 19 employees laid off in violation of the Act. The Company argues that it should be afforded an opportunity to show that this remedy is unduly burdensome and that the employees would have been eventually laid off even absent any unfair labor practices by the Company. The Company will be given such an opportunity to challenge the Board's remedies in separate compliance proceedings. See e.g. *Dean Gen'l Contractors*, 285 NLRB 573 (1987).

The Respondent's reliance on footnote 4 is unavailing. As the court's citation to *Dean General Contractors* makes clear, the court was simply restating the well-established principle that a respondent may, in a compliance proceeding, attempt to show that it would have laid off employees for some reason independent of the unfair labor practice. See, e.g., *Dean General Contractors*, 285 NLRB at 573–575 (respondent may introduce evidence at the compliance stage to show that unlawfully discharged employee subsequently would have been lawfully laid off upon completion of construction project); *Cassis Management Corp.*, 324 NLRB 324 fn. 3 (1997) (respondent may introduce evidence at the compliance

stage to show that even if the discriminatees had not been terminated, it would have subsequently contracted out the work they performed to another employer), *enfd.* 152 F.3d 917 (2d Cir. 1998); *Central Brooklyn Coordinating Council*, 330 NLRB No. 88 (2000) (“backpay period . . . should run from the date of the unlawful discharge until the date the discriminatees would have otherwise been discharged, absent their protected activity”). Furthermore, nothing the court says in footnote 4 contradicts the equally well-established principle that issues litigated and decided in an unfair labor practice proceeding may not be relitigated in the ensuing backpay proceeding. See *Transport Service Co.*, 314 NLRB 458, 459 (1994); *Baumgardner Co.*, 298 NLRB 26, 27–28 (1990), *enfd.* mem. 972 F.2d 1332 (3d Cir. 1992); *Best Glass Co.*, 280 NLRB 1365, 1367 (1986); *Sumco Mfg. Co.*, 267 NLRB 253, 255 (1983), *enfd.* 746 F.2d 1189 (6th Cir. 1984), *cert. denied* 471 U.S. 1100 (1985).

Here, the Respondent does not contend that the discriminatees would have been subsequently laid off for some reason independent of the unfair labor practice. Instead, it continues to assert the Baker Tanks defense. This, it may not do because the issue was litigated and decided in the underlying unfair labor practice proceeding. Accordingly, we find the allegations contained in paragraph 1 of the compliance specification to be true and shall grant the General Counsel’s motion for summary judgment with respect to these allegations.

2. Paragraph 2 of the compliance specification alleges that the backpay periods for 10 discriminatees continue until the Respondent offers them reinstatement. The Respondent contends in the amended answer and response to the notice to show cause that the discriminatees’ backpay periods did not continue beyond February 3, 1995. That contention is based on the Baker Tanks defense.<sup>4</sup>

As we explained in the previous section, the Respondent is not entitled to relitigate the Baker Tanks defense because that issue was litigated and decided in the unfair labor practice proceeding. Accordingly, we find the allegations contained in paragraph 2 of the compliance specification to be true and shall grant the General Coun-

sel’s motion for summary judgment with respect to these allegations.

3. Paragraph 3 of the compliance specification sets forth the backpay computations for the discriminatees named in paragraphs 1 and 2 through the second quarter of 1998 and states that the computations for future quarters will be calculated on the same basis for all discriminatees whose backpay continues beyond the second quarter of 1998. The amended answer and the response to the notice to show cause address the allegations in paragraph 3 by incorporating the factual assertions made with regard to paragraphs 1 and 2 of the compliance specification.

Such an answer lacks the specificity the Board’s rules quoted above require. Further, we have found that the Respondent is not entitled to a hearing on the assertions in its answers to paragraphs 1 and 2. Therefore, to the extent the Respondent relies on those assertions in its amended answer to paragraph 3, we find the answer insufficient. Accordingly, we find the allegations contained in paragraph 3 of the compliance specification to be true and shall grant the General Counsel’s motion for summary judgment with respect to these allegations.

4. Paragraph 5 of the backpay specification alleges the backpay periods for Charles Parker and James Weldon. The amended answer and the response to the notice to show cause raise the Baker Tanks defense. As we explained in section 1, the Respondent is not entitled to relitigate the Baker Tanks defense.

The amended answer also asserts that the discriminatees’ backpay periods ended when they became unable to perform the duties of their former positions due to illness or disability. The General Counsel’s motion concedes that the Respondent’s answer sufficiently raises the issue of the alleged dates the discriminatees’ backpay periods ended due to illness or disability.

Given the General Counsel’s concession, we shall deny his motion for summary judgment as to paragraph 5.

5. Paragraphs 6–8 of the backpay specification allege that the appropriate measure of backpay for three discriminatees is the earnings of a named representative employee. The amended answer and the response to the notice to show cause deny the appropriateness of the employee named as representative for comparison purposes. The Respondent asserts specific facts about why the person selected for comparison purposes is inappropriate, names alternative representative employees, and

<sup>4</sup> As stated above, on February 3, 1995, the Respondent completed Baker Tanks’ last order. In addition, the Respondent denies that the backpay period is continuing for employees Andrew Moore, Thaddeus H. Stokes, and Steward Ussery on the ground that they “rejected offers of employment.” However, the Respondent has not specified exactly when it made such offers, what positions were offered, and the terms of any such offers. In view of this lack of specificity, we find that the Respondent has not raised any issue warranting a hearing concerning the length of the backpay period for these three employees. *DeMuth Electric*, 319 NLRB 942, 943 (1995).

states that the earnings of those individuals are set forth in the backpay specification.<sup>5</sup>

The General Counsel contends that the Respondent's amended answer lacks the specificity Section 102.56(b) requires. We disagree. We find that the Respondent has sufficiently pled, with reference to appropriate supporting figures, its specific challenge to the compliance specification's identification of a representative employee. See *Refuse Compactor Service*, 322 NLRB 738, 739 (1996). Accordingly, we deny the General Counsel's motion for summary judgment on paragraphs 6 and 7.<sup>6</sup>

6. Paragraphs 9–14 of the backpay specification allege that the appropriate measure of backpay for three discriminatees is the earnings of named representative employees. Based on the explanation in the response to the notice to show cause, it is clear that the Respondent admits the allegations in these paragraphs subject to the issues of interim earnings, interim expenses, and failure to mitigate. The General Counsel's motion makes clear that it does not seek summary judgment with respect to interim earnings, interim expenses, and failure to mitigate issues.

Accordingly, with the understanding that we do not include the interim earnings, interim expenses, and failure to mitigate issues, we find the allegations contained in paragraphs 9–14 of the compliance specification to be true and shall grant the General Counsel's motion for summary judgment with respect to these allegations.

7. Paragraphs 15–23 of the backpay specification allege that the appropriate measure of backpay for a discriminatee is the earnings of named representative employees. Based on the explanation in the response to the notice to show cause, it is clear that the Respondent admits the allegations in these paragraphs subject to the issues of interim earnings, interim expenses, and failure to mitigate. The General Counsel's motion makes clear that it does not seek summary judgment with respect to interim earnings, interim expenses, and failure to mitigate issues.

Accordingly, with the understanding that we do not include the interim earnings, interim expenses, and failure to mitigate issues, we find the allegations contained in paragraphs 15–23 of the compliance specification to be true and shall grant the General Counsel's motion for summary judgment with respect to these allegations.

<sup>5</sup> The amended answer and response to the notice to show cause also raise the Baker Tanks defense with respect to one of the three discriminatees. As we explained in sec. 1, the Respondent is not entitled to relitigate the Baker Tanks defense.

<sup>6</sup> The Respondent admits par. 8, which sets forth the earnings of the employee named as representative for comparison purposes.

8. Paragraphs 24–26 of the backpay specification allege that the appropriate measure of backpay for Lawrence Trice would have earned during his backpay period is the earnings of his replacement. The amended answer and the response to the notice to show cause admit the earnings of the replacement are an appropriate measure of what the discriminatee would have earned; contend that the discriminatee's backpay period ended at an earlier date when he became unable to perform the duties of his former position due to illness or disability; denies the appropriateness of the medical expenses contained in the specification; and raise the issues of interim earnings, interim expenses, and failure to mitigate.

The General Counsel does not seek summary judgment with respect to interim earnings, interim expenses, medical expenses, and failure to mitigate. In the conclusion of his motion, the General Counsel concedes that the Respondent's claim that the discriminatee became unable to perform the duties of his former position due to illness or disability sufficiently raises a question about when the discriminatee's backpay period ended.

Given the General Counsel's concession, we shall deny the General Counsel's motion for summary judgment as to paragraphs 24 and 25.<sup>7</sup>

9. Paragraphs 27–38 of the backpay specification allege that the appropriate measure of backpay for 11 discriminatees is the earnings of named representative employees. The amended answer and response to the notice to show cause also questions interim earnings and interim expenses, and alleges a failure to mitigate. The General Counsel makes clear that it does not seek summary judgment with respect to interim earnings, interim expenses, and failure to mitigate.

As we explained in section 1, the Respondent is not entitled to relitigate the Baker Tanks defense. Accordingly, with the understanding that we do not include the interim earnings, interim expenses, and failure to mitigate issues, we find the allegations contained in paragraphs 27–38 of the compliance specification to be true and shall grant the General Counsel's Motion for Summary Judgment with respect to these allegations.

<sup>7</sup> The Respondent admits par. 26, which sets forth the earnings of the replacement employee. Contrary to the suggestion in fn. 3 of the General Counsel's motion, we do not believe the Respondent is implicitly raising the Baker Tanks defense with respect to the discriminatee, as the discriminatee's backpay period commenced after February 3, 1995. To avoid any confusion, we state that, by denying the General Counsel's motion for summary judgment with respect to pars. 24 and 25, we do not mean to suggest that the Respondent will be permitted to litigate the Baker Tanks defense with respect to this, or any other, discriminatee.

10. Paragraphs 39–48 of the backpay specification allege the backpay formula used for computing a discriminatee’s backpay. The amended answer and the response to the notice to show cause admit the allegations in these paragraphs.

Accordingly, based on the Respondent’s admissions, we find the allegations contained in paragraphs 39–48 of the compliance specification to be true and shall grant the General Counsel’s motion for summary judgment with respect to these allegations.

11. Paragraphs 49–61 of the backpay specification allege the backpay formula used for computing a discriminatee’s backpay. The amended answer and the response to the notice to show cause raise the Baker Tanks defense, question interim earnings and interim expenses, and allege a failure to mitigate. The General Counsel does not seek summary judgment with respect to interim earnings, interim expenses, and a failure to mitigate. As we explained in section 1, the Respondent is not entitled to relitigate the Baker Tanks defense.

Accordingly, with the understanding that we do not include the interim earnings, interim expenses, and failure to mitigate issues, we find the allegations contained in paragraphs 49–61 of the compliance specification to be true and shall grant the General Counsel’s motion for summary judgment with respect to these allegations.

12. Paragraphs 62–69 of the backpay specification allege the backpay formula for three discriminatees based on the earnings of named representative employees. The amended answer and the response to the notice to show cause raise the Baker Tanks defense, question interim earnings and interim expenses, and allege a failure to mitigate. The General Counsel does not seek summary judgment with respect to interim earnings, interim expenses, and failure to mitigate. As we explained in section 1, the Respondent is not entitled to relitigate the Baker Tanks defense.

Accordingly, with the understanding that we do not include the interim earnings, interim expenses, and failure to mitigate issues, we find the allegations contained in paragraphs 62–69 of the compliance specification to be true and shall grant the General Counsel’s Motion for Summary Judgment with respect to these allegations.

13. Paragraphs 70–72 of the backpay specification allege the backpay formula and the gross weekly backpay for a discriminatee. The response to the notice to show cause, in addressing the allegations in paragraph 106, makes clear that the Respondent is raising a Baker Tanks defense to the allegations in paragraphs 70–72. The General Counsel does not seek summary judgment with respect to interim earnings, interim expenses, and a failure to mitigate.

As we explained in section 1, the Respondent is not entitled to relitigate the Baker Tanks defense. Accordingly, with the understanding that we do not include the interim earnings, interim expenses, and failure to mitigate issues, we find the allegations contained in paragraphs 70–72 of the compliance specification to be true and shall grant the General Counsel’s Motion for Summary Judgment with respect to these allegations.

14. Paragraphs 80–81 of the backpay specification allege the formula for computing calendar quarter net interim earnings and calendar quarter net backpay. The amended answer denies these allegations based on lack of sufficient knowledge. The response to the notice to show cause claims that these paragraphs are not clear.

These paragraphs set forth the formula generally used to determine interim earnings and net backpay. The Respondent does not propose a different formula. In *Yerger Trucking, Inc.*, 319 NLRB 5, 6 (1995), the Board found a similar answer insufficient to withstand the General Counsel’s motion for summary judgment.<sup>8</sup>

Accordingly, we find the allegations contained in paragraphs 80–81 of the compliance specification to be true and shall grant the General Counsel’s motion for summary judgment with respect to these allegations.

15. Paragraphs 82–88, 90–95, 97, and 99–106 of the backpay specification set forth the formula for computing the total amount of backpay for each discriminatee. The General Counsel moves for summary judgment with respect to specified subdivisions of these paragraphs alleging the backpay period and the gross backpay of the discriminatees. The amended answer and the response to the notice to show cause raise the Baker Tanks defense, question interim earnings and expenses, and allege a failure to mitigate.<sup>9</sup> The General Counsel does not seek summary judgment with respect to interim earnings, interim expenses, and a failure to mitigate. As we explained in section 1, the Respondent is not entitled to relitigate the Baker Tanks defense.

Accordingly, with the understanding that we do not include the interim earnings, interim expenses, and failure to mitigate issues, we find the allegations contained in specified subdivisions of paragraphs 82–88, 90–95, 97, and 99–106 of the compliance specification to be true and shall grant the General Counsel’s Motion for Summary Judgment with respect to these allegations.

<sup>8</sup> As in *Yerger Trucking*, the Respondent will not be precluded from presenting evidence concerning the amount of interim earnings.

<sup>9</sup> With respect to pars. 93, 101, and 106, the Respondent raises only the Baker Tanks defense.

## ORDER

IT IS ORDERED that the General Counsel's Motion for Partial Summary Judgment is granted as to the allegations contained in paragraphs 1–3, 8–23, 26–72, 80–81, 82(A)&(B), 83(A)&(B), 84(A)&(B), 85(A)&(B), 86(A)&(B), 87(A)&(B), 88(A)&(B), 90(A)(B)&(C), 91(A)&(B), 92(A)&(B), 93(A)&(B), 94(A)&(B), 95(A)&(B), 97(A)&(B), 99(A)&(B), 100(A)&(B), 101, 102(A)(B)&(C), 103(A)&(B), 104(A)&(B), 105(A)&(B), and 106, except as stated below.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 10 for the purpose of arranging a hearing before an administrative law judge limited to determining whether discriminatees Lawrence Trice's, Charles Parker's, and James Weldon's

backpay periods ended when, if ever, they became unable to perform the duties of their former positions due to illness or disability; resolving disputes pertaining to Trice's medical expenses; resolving the backpay allegations pertaining to discriminatee Aric Evans; and resolving disputes pertaining to interim earnings, interim expenses, and failure to mitigate.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision containing findings of fact, conclusions of law, and recommendations based on all the record evidence. Following service of the judge's decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.